Supreme Court, U.S.
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No. 02-716

IN THE
SUPREME COURT OF THE UNITED STATES

Thomas J. "T.J." Hively

Petitioner

vs.

United States of America

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a federal court of appeals has fully and fairly considered a defendant's colorable double jeopardy claim, under the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, when it has summarily dismissed the defendant's appeal without first reviewing the record on appeal.

LIST OF PARTIES

The parties to this Proceeding are as follows:

Petitioner is Thomas J. "T. J." Hively, Defendant before the trial court and Appellant before the Eighth Circuit Court of Appeals.

Respondent is the United States of America, Plaintiff before the trial court and Appellee before the Eighth Circuit Court of Appeals.

CORPORATE DISCLOSURE STATEMENT

Neither Petitioner nor Respondent are corporations.

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IN THE
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No. _____

Thomas J. "T. J." Hively,

Petitioner

vs.

United States of America,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, Thomas J. "T. J." Hively, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS DELIVERED BELOW

The trial court's unreported order of recusal of May 6, 2002, is printed at Appendix A. The Eighth Circuit's unpublished order granting Respondent's motion to dismiss Petitioner's appeal, entered July 2, 2002, is printed at Appendix B. The Eighth Circuit's unpublished order of August 1, 2002, denying Petitioner's request for rehearing by the panel, is printed at Appendix C.

GROUNDS FOR THE INVOCATION OF JURISDICTION OF THE COURT

The United States District Court for the Eastern District of Arkansas entered its order of recusal on May 6, 2002. Petitioner timely filed a notice of appeal. On July 2, 2002, an order was entered by the Eighth Circuit Court of Appeals granting Respondent's motion to dismiss Petitioner's appeal. The Eighth Circuit Court of Appeals denied Petitioner's request for rehearing by the panel on August 1, 2002. This Petition For Writ Of Certiorari is being submitted within ninety days of that date. The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS (AND RULES) INVOLVED

This case concerns the application of the following provisions:

Fifth Amendment to the United States Constitution

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Eighth Circuit Rule 47A(b)

> (b) ON MOTION OF PARTIES. The appellee may file a motion to dismiss a docketed appeal on the ground the appeal is not within the court's jurisdiction. Except for good cause or on the motion of the court, a motion to dismiss based on jurisdiction shall be filed within 15 days after the court has docketed the appeal.
>
> On expiration of the time allowed for filing or express waiver of the right to file a response, or on receipt of the response, the clerk will distribute to the court the briefs filed, the record on appeal, and the motion and response. The court will consider the motion and enter an appropriate order.

Except as the court orders, the filing of a motion to dismiss does not toll the time limitations set forth in the Federal Rules of Appellate Procedure or these rules.

Federal Rule of Appellate Procedure 11(g)

(g) Record for a Preliminary Motion in the Court of Appeals. If, before the record is forwarded, a party makes any of the following motions in the court of appeals:

- for dismissal;
- for release;
- for a stay pending appeal;
- for additional security on the bond on appeal or on a supersedeas bond; or
- for any other intermediate order—

the district clerk must send the court of appeals any parts of the record designated by any party.

STATEMENT OF THE CASE

I. INTRODUCTION

As is set forth in detail below, Petitioner contends that the Eighth Circuit Court of Appeals had both jurisdiction and an obligation to adjudicate his appeal from a particular district court order on the basis that he set forth a colorable double jeopardy claim under the relevant facts and law. The Eighth Circuit's refusal to consider the claim was erroneous because it did not comply with procedural rules requiring review of the record on appeal to determine whether an appealable issue (i.e. a colorable double jeopardy claim) in fact had been stated. The error must be corrected, both because Petitioner's liberty interests are threatened, but also because of the important societal interest in ensuring that litigants, and more importantly, courts, are governed by and held accountable under uniform rules of procedure. Petitioner respectfully submits that this Court has and should exercise jurisdiction to review the Eighth Circuit's judgment pursuant to a writ of certiorari.

II. PROCEEDINGS BELOW

September 13, 2000—Petitioner was charged in a 64-count Indictment with acts of racketeering, mail fraud, money laundering, and extortion stemming from his service as prosecuting attorney for five (5) counties in Arkansas.

January 24, 2002—A jury trial commenced in the federal court of the Honorable James M. Moody.

February 4, 2002—The trial court dismissed paragraph "a." of Racketeering Act 45 of Count 1 of the Indictment based upon its failure to state an offense under federal law.

March 1, 2002 Petitioner filed numerous motions after the conclusion of the government's case-in-chief, including:

1. Motion For Judgment Of Acquittal (Counts 2-13 and Racketeering Acts 1-12) (the Child Support Enforcement mail fraud counts).
2. Motion For Judgment Of Acquittal Or Dismissal (Counts 16-34 and Racketeering Acts 13-14) (the Drug Task Force Money Laundering counts).
3. Motion For Judgment Of Acquittal Or For Disclosure Of Grand Jury Materials (Counts 63-64 and Racketeering Acts 43 a. and 44 a.) (the extortion counts).
4. Motion For Dismissal Or Judgment Of Acquittal (Counts 35-62 and Racketeering Acts 15-42) (the David Miller/ Izard County mail fraud counts).
5. Motion For Dismissal Or Judgment Of Acquittal (Counts 14-15 and Racketeering Acts 13-14) (the Drug Task Force mail fraud counts).
6. Motion For Judgment Of Acquittal On Counts 2-13, 14-15, 16-34, and 35-62.
7. Motion For A Determination By The Court Of The Sufficiency Of The Evidence As To The Existence Of A Conspiracy In Counts 63, 64, And Racketeering Acts 43, 44, And 45 b. And The Admissibility Of Certain Co-conspirator Declarations.

On this same date, Petitioner also made an oral motion for judgment of acquittal on Count 1 (racketeering). Three days later, on March 4, 2002, Petitioner filed another Motion For Judgment Of Acquittal relating to Counts 14-15 (Racketeering Acts 13-14).

March 6, 2002 The trial court issued an order and judgment of acquittal as to Count 13 (Racketeering Act 12 of Count 1) and Counts 35-62 (Racketeering Acts 15-42 of Count 1). With respect to the remaining motions identified above, the trial court reserved ruling on those motions.

March 8, 2002—At the close of Petitioner's case-in-chief, the trial court granted Petitioner's motion for judgment of acquittal with respect to the money laundering counts in Counts 16-34. The rulings on the remaining motions continued to be reserved by the court.

March 12-15, 2002—The jury deliberated Count 1 (racketeering), Counts 2-12 (Child Support Enforcement mail fraud), Counts 14-15 (Drug Task Force mail fraud) and Counts 63-64 (the John Milton Northrop and Kathy Sampson Clark/Willie Clark extortion counts), as well as their corresponding racketeering acts (in addition to Racketeering Act 45 [the Troy Gibson extortion count], which had no corresponding substantive count).

March 15, 2002—The jury announced to the trial court that it was deadlocked on the remaining sixteen charges. A mistrial was not declared, but the jury was discharged and the trial court took the remaining motions under advisement. Petitioner and the government were permitted to file additional simultaneous briefs with respect to the remaining counts (including the racketeering charge in Count 1) and for dismissal of certain allegations in Racketeering Acts 43, 44, and 45 of Count 1.

Thursday, May 2, 2002—Counsel for Petitioner and the government were notified by court personnel that a ruling addressing Petitioner's remaining motions for judgment of acquittal had been drafted and that the order would be available to be picked up on Monday, May 6, 2002, at 10:30 a.m. See Appendix H, Exhibit A.

Friday, May 3, 2002, at 4:46 p.m.—The government faxed to Petitioner's counsel a copy of a letter addressed to Judge James M. Moody, the trial court judge, that had apparently been delivered to the court minutes before. The letter stated that the government had the day before, on May 2, 2002, been informed that Judge Moody had apparently represented Petitioner in a civil legal malpractice matter in the early 1990's while Moody was still an attorney in private practice. See Appendix H, Exhibit B. Moreover,

unbeknownst to Petitioner and his counsel, sometime on Friday, May 3rd or that weekend, the government made a delivery of substantial documentation to the trial court for it to consider in connection with the government's May 3, 2002 letter. The government supplied Petitioner with copies of these materials after the court had already issued an order recusing from the case and after a request was made for copies of any documents supplied to the Court. The case was transferred to a successor judge.

Monday, May 6, 2002 As a result of the trial court's review of the file supplied to him by the government (and apparently not based upon the Court's independent recollection), Judge Moody concluded that he should recuse from the case to avoid any appearance of partiality that might be present due to his apparent representation of Petitioner many years before. See Appendix A. In his order, Judge Moody also stated that prior to receiving the government's letter, he did not recall the representation and that it did not affect any of his prior decisions. Again, both before and at the time of the issuance of Judge Moody's order of recusal based upon indications from court personnel Petitioner and his counsel understood that Judge Moody's order ruling upon the outstanding motions identified above had already been finalized. Furthermore, the ministerial act of filing the order with the district court clerk and allowing the parties to pick it up were the only remaining tasks incident to the ruling. See Appendix H, Exhibit A.

May 15, 2002—Petitioner timely filed a Notice Of Appeal pursuant to Federal Rule of Appellate Procedure 3(a) giving notice of his intent to appeal to the United States Court of Appeals for the Eighth Circuit from Judge Moody's order on May 6, 2002, which implicated Hively's rights against double jeopardy as set forth in the Fifth Amendment to the United States Constitution. See Appendix D.

May 22, 2002—The United States filed a motion to dismiss Petitioner's appeal for lack of jurisdiction (and supporting brief) contending that Petitioner's appeal of Judge Moody's order of recusal did not constitute a "final" order which would give the

Eighth Circuit jurisdiction to hear the appeal. See Appendix E and F.

May 23, 2002—Petitioner filed a document designating certain docket items for appeal, including but not limited to, Judge Moody's unfiled order which was to be filed on May 6, 2002. See Appendix G.

May 30, 2002—The Honorable Stephen Reasoner, the successor judge to whom the case was assigned after Judge Moody's recusal, entered an order of recusal due to illness. The case was transferred to The Honorable George Howard who is the current presiding judge in the underlying action.

June 3, 2002—Petitioner filed a Motion To Strike, Or In The Alternative, Response To Government's Motion To Dismiss Appeal arguing, in pertinent part, that his appeal presented a colorable double jeopardy claim qualifying for interlocutory review which was ripe for adjudication. See Appendix H. Petitioner specifically argued that the issue on appeal that he intended to present to the Eighth Circuit was that the timing of the trial court's decision to recuse, occurring subsequent to its discharge of the jury and immediately prior to entry of its decision ruling upon Petitioner's pending motions for judgment of acquittals, deprived Petitioner of a final verdict which could have been pled as a bar to any subsequent prosecution in violation of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.

To the extent that the original district court judge acquitted Petitioner of any or all of the remaining sixteen counts, but merely did not engage in the ministerial act of filing the Order before recusing and losing jurisdiction of the case, Petitioner submitted that the timing of the recusal implicated his double jeopardy rights and constituted a colorable double jeopardy claim, qualifying for interlocutory review. The pleading was supported by the Affidavit of Sherry Joyce, the facts of which supported the basis for the double jeopardy claim. See Appendix H, Exhibit A.

July 2, 2002—The United States Court of Appeals For The Eighth Circuit granted the motion of Respondent for dismissal of Petitioner's appeal pursuant to Eighth Circuit Rule 47A(b). The Court denied as "moot" Petitioner's Motion To Strike, Or In The Alternative, Response To Government s Motion To Dismiss Appeal. See Appendix B.

July 16, 2002—Petitioner filed a Petition For Rehearing By Panel with the Eighth Circuit Court of Appeals requesting a rehearing and reconsideration of its dismissal issued on July 2, 2002. Petitioner requested that the Court's judgment be withdrawn and that the Court enter a new judgment denying the motion to dismiss the appeal on the basis that such decision violated the plain language of Eighth Circuit Rule 47A(b), the very rule under which the panel's judgment was purportedly entered. See Appendix I.

As reflected in an affidavit attached to the Petition For Rehearing By Panel (Appendix I, Exhibit A), Petitioner argued that it was apparent the Eighth Circuit panel that considered the motion to dismiss did not review the record on appeal before or when considering the motion and thus did not have any of the necessary record to determine whether Petitioner in fact had stated a colorable double jeopardy claim qualifying for interlocutory review before the Court. Petitioner argued that the record was never provided or forwarded to the court in violation of the applicable rules of procedure.

August 1, 2002—The United States Court of Appeals for the Eighth Circuit denied the Petition For Rehearing By The Panel filed by Petitioner.

REASONS FOR GRANTING THE PETITION

I. WHETHER A FEDERAL COURT OF APPEALS HAS FULLY AND FAIRLY CONSIDERED A DEFENDANT'S COLORABLE DOUBLE JEOPARDY CLAIM, UNDER THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION, WHEN IT HAS SUMMARILY DISMISSED THE DEFENDANT'S APPEAL WITHOUT FIRST REVIEWING THE RECORD ON APPEAL.

A. Petitioner's Appeal Set Forth A Colorable Double Jeopardy Claim That Should Have Been Adjudicated By The Eighth Circuit Court of Appeals.

1. Colorable Double Jeopardy Claims Come Within The Collateral Order Exception To The Rule Precluding Review Of Decisions Unless They Constitute Final Judgments.

Under 28 U.S.C. § 1291, federal courts of appeal have jurisdiction to consider all final decisions of district courts. In Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S.Ct. 1221 (1949), this Court recognized that one "exception" to the final judgment rule is the collateral order doctrine. Holding that a final judgment was to be given a "practical rather than technical construction," the Court concluded that certain orders collateral to the litigation which might not ordinarily warrant interlocutory review in fact could be immediately appealed so long as they were within "that small class [of orders] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." Id., 337 U.S. at 546, 69 S.Ct. at 1226.

In other words, "[t]o come within the 'small class' of decisions excepted from the final judgment rule by Cohen, the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable upon appeal from the final judgment." Coopers & Lybrand v. Livesay, 437 U.S. 463, 468, 98 S.Ct. 2454, 2458 (1978). While Petitioner recognizes that this Court has warned against extension of the collateral order doctrine to criminal cases and has characterized the orders in criminal cases which fit within the doctrine as "very few" in number, Petitioner submits that the present issue falls squarely within the doctrine. Carroll v. United States, 354 U.S. 394, 403, 77 S.Ct. 1332, 1338 (1957).[1]

In Abney v. United States, 431 U.S. 651, 97 S.Ct. 2034 (1977), this Court concluded that a potential double or prior jeopardy violation cannot be effectively remedied if the defendant is required to undergo a second trial and then have the issue considered only upon appeal following conviction in the second trial. According to Abney, the protection is designed to prevent the strain, cost, and personal embarrassment to the defendant from having to undergo a second trial in order to litigate a claim

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[1] In fact, one of the first applications of the collateral order doctrine was in a criminal case, Stack v. Boyle, 342 U.S. 1, 72 S.Ct. 1 (1951). Justice Jackson, in an interlocutory appeal relating to the defendant's desire to seek habeas corpus relief after the trial court denied a motion to reduce bail, explained in a concurring opinion that "[a]n order fixing bail can be reviewed without halting the main trial its issues are entirely independent of the issues to be tried and unless it can be reviewed before sentence, it can never be reviewed at all." Id., 342 U.S. at 12, 72 S.Ct. at 8 (J. Jackson, concurring). Similarly, in this case the issue of whether Petitioner had a colorable double jeopardy claim could have been decided after a brief review of the record on appeal. If the issue is not resolved, and the successor district court judge denies Petitioner's motions for judgment of acquittal with respect to counts upon which the original district court judge may have acquitted Petitioner (although such ruling may not yet have undergone the ministerial act of being filed with the district court clerk), the effect will be that Petitioner will be subject to subsequent prosecution for alleged crimes for which he has already been acquitted.

vindicating his double jeopardy interest. Id., 431 U.S. at 661, 97 S.Ct. at 2041. Consequently, when the defendant presents a colorable claim of prior jeopardy, the appropriate remedy is interlocutory appeal and consideration of the claim without subjecting the defendant to further prosecution. See generally Richardson v. United States, 468 U.S. 317, 104 S.Ct. 3081 (1984).

The Abney court further held that while affording such review to a defendant prior to the subsequent trial might "encourage some defendants to engage in dilatory appeals," such was the cost of ensuring preservation of a defendant's double jeopardy rights. Id., 431 U.S. at 662 n. 8, 97 S.Ct. at 2042 n. 8 (observing that district courts also have means to weed out frivolous double jeopardy claims). Moreover, one prominent treatise observes that "[t]he Abney principle has been applied to permit pretrial appeals on a wide variety of double jeopardy claims[.]" WRIGHT, MILLER AND COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2d § 3918.5, at 492 (1992).

2. Petitioner's Appeal To The Eighth Circuit Was Based Upon A Colorable Double Jeopardy Claim.

The issue on appeal that Petitioner attempted to present (but was precluded from doing so) to the Eighth Circuit was that the timing of the district court's decision to recuse, occurring subsequent to its discharge of the jury and immediately prior to entry of its decision ruling upon Petitioner's pending motions for judgment of acquittal, deprived Petitioner of a final verdict which could have been pled as a bar to any subsequent prosecution in violation of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. Specifically, the trial court recused following receipt of the government's letter merely suggesting a possible basis for disqualification. The letter itself was delivered to the court within 24 hours after the court had notified counsel for both parties that the order on the pending motions for judgment of acquittal with respect to the remaining counts could be picked up on the following Monday. Given the original district court's judgments of acquittal with respect to 48 of the 64 counts, the court's

announcement that its ruling could be obtained, and the government's last-minute suggestion of an appearance of impropriety, a reasonable observer could justifiably conclude that the trial judge had in fact ruled on the motions and such ruling was at least partially in Petitioner's favor. If so, the favorable ruling would obviously result in acquittals on all or some of the remaining counts and provide a constitutional bar to further prosecution with respect to any counts upon which the district court would have concluded there was insufficient evidence to support a conclusion of guilt.

This Court has held that the protection of the double jeopardy clause of the Fifth Amendment to the United States Constitution arises whenever there has been some event, such as an acquittal, which terminates the original jeopardy. See Richardson, 468 U.S. at 325, 104 S.Ct. at 3086. Moreover, a trial court's finding of insufficient evidence is the equivalent of an acquittal for double jeopardy purposes. Id. To the extent that the original district court judge acquitted Petitioner of all or any of the remaining 16 counts, but merely did not engage in the ministerial act of filing the order before recusing and losing jurisdiction of the case, the timing of the recusal clearly implicated Petitioner's double jeopardy rights and constituted a colorable double jeopardy claim qualifying for interlocutory review before the Eighth Circuit Court of Appeals. Petitioner's appeal should not have been dismissed without review of the pertinent record on appeal.

B. The Eighth Circuit's Rejection Of Petitioner's Colorable Double Jeopardy Claim Was Not In Compliance With The Eighth Circuit's Own Rules For Adjudicating Whether Certain Issues Are In Fact Appealable.

Despite Hively's presentation of a colorable double jeopardy claim, the Eighth Circuit dismissed Hively's appeal in noncompliance with its own rules.[2] Eighth Circuit Rule 47A(b) specifically provides that:

> [t]he appellee may file a motion to dismiss a docketed appeal on the ground the appeal is not within the court's jurisdiction . . . On expiration of the time allowed for filing or express waiver of the right to file a response, or on receipt of the response, *the clerk will distribute to the court the briefs filed, the record on appeal, and the motion and response.* The court will consider the motion and enter an appropriate order.

8th Cir. R. 47A(b) (emphasis added).

With this in mind, on July 2, 2002, a judgment was entered pursuant to Eighth Circuit Rule 47A(b) granting Respondent's motion to dismiss Petitioner's appeal. See Appendix B. This was done notwithstanding the fact that after Petitioner's receipt of the dismissal order, Petitioner learned that the district court clerk in Little Rock, Arkansas (who had been assigned to preparing the specifically-designated record on appeal) had been told not to prepare it in light of Respondent's pending motion to dismiss the appeal. See Appendix I, Exhibit A. Accordingly, no record was ever provided or forwarded to the Eighth Circuit panel.

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[2]Additionally, the Eighth Circuit's summary disposition of this case without possession of the record designated by Petitioner is in violation of Federal Rule of Appellate Procedure 11(g) which provides, "[i]f, before the record is forwarded, a party makes [a motion for dismissal] . . . the district clerk must send the court of appeals any parts of the record designated by any party." Here, Petitioner designated the record on May 23, 2002, but no record was ever forwarded to the Eighth Circuit Court of Appeals. See Appendix I, Exhibit A. Although Petitioner was unaware that no such record had been forwarded until after the court had summarily dismissed Petitioner's appeal, Petitioner notified the court of this error in its Petition for Rehearing. See Appendix I.

In light of these facts, it is clear that if the Eighth Circuit panel that considered the motion to dismiss did not review the record on appeal before or when considering such motion, the panel would not have had any of the necessary documentation to determine whether Petitioner in fact had asserted a colorable double jeopardy claim qualifying for interlocutory review. This is significant because having complete access to the record on appeal is the very prerequisite for meaningfully determining whether or not an appeal is sustainable. See, e.g., United States v. Garrett, 961 F.2d 743 (8th Cir. 1992) (court of appeals generally does not address an issue unless the record clearly demonstrates that the issue was raised in the district court); United States v. Madkins, 994 F.2d 540 (8th Cir. 1993) (court of appeals does not generally consider material outside of the record). Such a deficiency violates the clear, unmistakable language of Eighth Circuit Rule 47A(b), the very rule under which the Eighth Circuit panel's judgment was rendered. Petitioner's request for a rehearing by the panel upon this very ground was denied, without comment, on August 1, 2002. See Appendix C.

C. Petitioner's Presentation Of A Colorable Double Jeopardy Claim And The Court Of Appeals' Noncompliance With Its Own Procedural Rules When Rejecting That Claim Collectively Constitute Special And Important Reasons Warranting This Court's Grant of Certiorari In This Case.

1. Certiorari To Review The Erroneous Judgment Rendered Below Is Necessary Because Of The Important Societal Interests At Stake.

Rule 10(a) of the United States Supreme Court's rules of procedure provide in pertinent part that a petition for a writ of certiorari will be granted only where there are "special and important" reasons for granting it. SUP. CT. R. 10(a). Such reasons include instances in which "a United States Court of Appeals . . . has so far departed from the accepted and usual course of judicial

proceedings . . . as to call for an exercise of this Court's power of supervision." SUP. CT. R. 10(a). This Court has interpreted the concept of importance as relating to the significance of the issues "to the public as distinguished from" the importance to the particular "parties" involved. Layne and Bowler Corp. v. Western Well Works, 261 U.S. 387, 393, 43 S. Ct. 422, 423 (1923); Rice v. Sioux City Cemetary, 349 U.S. 70, 79, 43 S. Ct. 422, 423 (1955). The instant case falls into this category.

In its capacity as the court from which all federal district courts and courts of appeal obtain their guidance, this Court has a special responsibility to ensure the proper functioning of the federal judiciary. In carrying out this role, this Court has a duty to resolve questions pertaining to federal practice, jurisdiction and procedure. As Justice Stephens has stated, "as the court of last resort in the federal system, we have supervisory authority and therefore must occasionally perform a pure error-correcting function in federal litigation." Florida v. Rodriquez, 469 U.S. 1, 7, 105 S. Ct. 308, 311 (1984) (Stephens, J., dissenting). This role is well-established. McNabb v. United States, 318 U.S. 332, 63 S. Ct 608 (1943) (in which this Court recognized its supervisory power over lower federal court proceedings). This court has granted certiorari with respect to a number of important federal jurisdictional and procedural issues, including but not limited to construing federal rules of civil and criminal procedure. See, e.g., Hickman v. Taylor, 329 U.S. 495, 67 U.S. 385 (1947); Upshaw v. United States, 335 U.S. 410, 69 S. Ct. 170 (1948); Schlagenhauf v. Holder, 379 U.S. 104, 109, 85 S. Ct. 234, 238 (1964). It has also addressed other instances in which lower court decisions had to be reversed "[b]ecause of the threat to the goal of uniformity of federal procedure posed by a decision below." See Hanna v. Plumer, 380 U.S. 460, 463, 85 S. Ct. 1136, 1139-40 (1965).

Petitioner's grievance falls into this class of cases. The issue is simple—when an appellant submits an issue on appeal (such as a colorable double jeopardy claim), the Federal Rules of Appellate Procedure and the Eighth Circuit's own rules envision that it will, when presented with a motion to dismiss the appeal,

review the record on appeal to determine whether a justiciable issue has been raised. With this in mind, Petitioner respectfully submits that this Court should take the same action in the instant case which was taken by the *en banc* court in United States v. Stemm, 835 F.2d 732 (10th Cir. 1987) wherein a Tenth Circuit panel did not follow its own rules and summarily dismissed an appeal on its merits in the absence of a full record on appeal.

The defendant in Stemm argued in pertinent part that a certain local rule was incorrectly applied because the particular panel that reviewed his case did not have before it a "record on appeal" when it decided the case on the merits. Id. at 734. The *en banc* court agreed and held that, in vacating the order and judgment of the panel and returning the case for full briefing and a determination on the merits, "the panel's determination of the merits of th[e] case was improper for failure to strictly comply with the basic requirements for such [summary] disposition." Id. at 734. The Tenth Circuit stated:

> Courts must be ever vigilant in the exercising of authority. As the bastion toward which people turn for ultimate justice, a court ill serves its duty by anything less than scrupulous adherence to the limitations of its own jurisdiction. In this case, the panel neglected the strictures on its authority and proceeded improvidently by reaching the merits of the appeal in the absence of a record on appeal.
>
> It makes no difference here that the documents and transcripts upon which summary disposition was based were records that would be essential to any considered determination on the merits. [The local rule] mandates that summary review will be predicated on a full record on appeal, and the record before the panel does not fit that definition. Counsel and litigants are entitled to rely upon the notion that this court will precisely follow its own

> rules in every case before it. The fact it did not do so in this instance dictates but one result.

Id. at 734-35.

Petitioner's case is apposite. The Eighth Circuit panel did not have the record on appeal before it when summarily disposing of the case. Nonetheless, when Petitioner filed his appeal with the Eighth Circuit alleging a colorable double jeopardy claim, he was entitled to rely upon the principle that the Eighth Circuit would itself follow the rules that it expects all litigants, including Petitioner, to follow. That is, that the Eighth Circuit would review the designated record on appeal before summarily disposing of the case pursuant to Eighth Circuit Rule 47A(b) and ruling on Respondent's motion to dismiss. Rather than adhering to this rule, the Eighth Circuit panel that dismissed Petitioner's case neglected this provision by which it was bound and rendered a decision without the benefit of the documents and transcripts that were necessary for an informed and educated determination. Such disregard for these procedural rules does not constitute a healthy precedent for subsequent litigants in our federal courts. The Eighth Circuit's judgment, rooted in noncompliance with its own strictures, should be vacated and the case should be returned to that court for a determination of whether Petitioner has stated a colorable double jeopardy claim based upon the record of the underlying proceedings.

2. Certiorari To Review The Erroneous Judgment Rendered Below Is Necessary To Preclude Petitioner's Rights From Being Violated In This Case.

Petitioner recognizes that this Court will generally "not grant a certiorari to review evidence and discuss specific facts." United States v. Johnston, 268 U.S. 220, 227, 49 S. Ct. 496, 497 (1925). However, this Court has on occasion granted certiorari to address matters of evidence in instances where the decision below was seemingly wrong and presented substantial due process issues. See, e.g., Thompson v. City of Louisville, 362 U.S. 199, 80 S. Ct.

624 (1960); Garner v. Louisiana, 368 U.S. 157, 163, 82 S. Ct. 248, 251 (1961); Washington v. United States, 357 U.S. 348, 78 S. Ct. 1373 (1958). Absent this Court's intervention, Petitioner's rights will be contravened in this case.

The harm from which Petitioner suffers and for which he seeks this Court's immediate intervention relates to the double jeopardy that threatens him if he is not afforded the benefit of any favorable ruling that was made with respect to his pending motions for judgment of acquittal (before the original trial court judge's recusal took place). The Eighth Circuit's dismissal of Petitioner's double jeopardy claim, without having secured even a partial record on appeal to review, further subjects him to this unjustified double jeopardy threat.

This Court has held that:

> [t]he fundamental nature of the guarantee against double jeopardy can hardly be doubted. . . . Today, every State incorporates some form of the prohibition in its constitution or common law. . . . [T]he underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense, and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty. This underlying motion has from the very beginning been part of our constitutional tradition. Like the right to trial by jury, it is clearly fundamental to the American scheme of justice.

Benton v. Maryland, 395 U. S. 784, 795-96, 89 S.Ct. 2056, 2063 (1969) (internal citations omitted). With these principles in mind, Petitioner will be substantially prejudiced without this Court's vacation of the Eighth Circuit's judgment.

The authors of one distinguished treatise observe that "[a] verdict of acquittal, express *or implied*, is, without entry of a judgment, a bar to a subsequent prosecution for the same offense." 21 AM JUR 2D, CRIMINAL LAW § 341, at 392 (1998) (*citing* Green v. United States, 355 U.S. 184, 78 S.Ct. 221 (1957)) (emphasis added). Clearly, in this case it can be deduced that while the district court's order may not yet have undergone the ministerial act of being file-marked with the clerk, the court had in fact rendered a ruling on the pending motions for judgment of acquittal. Given the history of the proceedings, and the fact that the court had previously already dismissed or acquitted Petitioner of 48 of the initial 64 counts, there is a substantial likelihood that the court had acquitted Petitioner on some or all of the remaining counts prior to the time that it recused.

Such an acquittal would provide Petitioner with a bar to re-prosecution on the same charges. Petitioner's appeal, rooted in the timing of the recusal (immediately prior to entry of its decision ruling upon Petitioner's motions for judgment of acquittal), deprived Petitioner of that final verdict which could have been pled as a double jeopardy bar to subsequent prosecution. Such an argument clearly constitutes a substantial, exceedingly "colorable" double jeopardy claim.

CONCLUSION

The Petition For A Writ of Certiorari should be granted.

Respectfully submitted,

Samuel A. Perroni
Counsel of Record

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Little Rock, Arkansas 72201
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Fax. (501) 372-6333
Counsel for Petitioner

APPENDIX A

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
LITTLE ROCK DIVISION

UNITED STATES OF AMERICA

PLAINTIFF

VS. No. 4:00cr00187(1-3)

THOMAS JAY "T J" HIVELY;
WESLEY JOHN "BUTCH" KETZ, JR.; and
GARY WAYNE EDWARDS

DEFENDANTS

ORDER

Following the dismissal of the jury on March 15, 2002, I have had under consideration motions for judgment of acquittal made by the defendant during the trial. It was my intention to make a final ruling on these motions and file an order with the Clerk today, May 6, 2002. On May 2, 2002, I advised the parties of my intentions with respect to issuing this ruling.

On May 3, 2002, at 4:30 p.m., I received a letter from U.S. Attorney Bud Cummins bringing to my attention the fact that I had represented T.J. Hively in a legal malpractice action filed in Independence County. At the time I received the letter, I had no recollection of the suit or that I had ever represented T.J. Hively.

The U.S. Attorney disclosed that the information about the suit had come from the attorney who filed the complaint against Hively. I asked for the attorney's file and reviewed it over the weekend. From the file, I reached the following conclusions.

For a number of years up to the time of my appointment as a judge in 1995, I was one of the principal attorneys for CNA Insurance Company, which is the legal malpractice insurer for the

Arkansas Bar Association. On behalf of CNA, I represented attorneys in numerous cases all over the state. I was employed by the insurance carrier to assume the defense of a legal malpractice case against T.J. Hively. Other than some written discovery requests prepared by a legal assistant, there does not appear there was any activity in the case until the deposition of the plaintiff was taken by me in Little Rock on March 27, 1995. The plaintiff being deposed was James Edwards, the brother of Gary Edwards, a co-defendant in this criminal case. T.J. Hively attended the deposition. A second deposition of the plaintiff's expert witness was taken by me on April 28, 1995.

The file does not reflect any further activity until an Order of Voluntary Dismissal Without Prejudice was entered by the Circuit Court of Independence County on May 19, 1995, on the motion of the plaintiff. I do not recall the circumstances as to why the case was dismissed by the plaintiff.

When this criminal case was assigned to me on September 13, 2000, and up until May 3, 2002, when I received the letter from the U.S. Attorney, I was totally unaware of the circumstances recited above. If I had known that I had represented Hively in any matter, I would have recused from the case at the outset, not because of any actual bias for or against any party, but rather because there could be a public perception that I would be unable to perform my judicial functions in an impartial manner.

I have no reason to question the validity of any of the rulings that I have made in this case. All of my rulings were made in complete ignorance of any potential conflict. Now that I am made aware of my representation of T.J. Hively, I am recusing from the case to avoid any appearance of partiality and I will not issue any further orders. The case will be reassigned by random draw to another United States District Judge and will proceed as that judge deems appropriate.

Dated this 6th day of May, 2002.

/S/ James M. Moody
United States District Judge

APPENDIX B

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 02-2292

Appeal from the United States
District Court for the Eastern District of Arkansas

United States of America,

Appellee,

vs.

Thomas James Hively, also known
As T.J. Hively,

Appellant

JUDGMENT

The motion of appellee for dismissal of this appeal is granted. The appeal is hereby dismissed. See Eighth Circuit Rule 47A(b). Appellant's motion to strike is denied as moot. (5361-010199)

July 2, 2002

Order entered at the Direction of the court
/S/ Michael E. Gans

Clerk, U. S. Court of Appeals, Eighth Circuit

Delivered by Judge Panel - Pasco M. Bowman,
Morris S. Arnold, and Kermit E. Bye

APPENDIX C

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 02-2292

Appeal from the United States
District Court for the Eastern District of Arkansas

United States of America,

Appellee,

vs.

Thomas James Hively, also known
As T.J. Hively,

Appellant

The petition for rehearing by the panel filed by Appellant Hively is denied.

(5193-010199)

August 1, 2002

Order Entered at the Direction of the court:

/S/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit
Delivered by Judge Panel - Pasco M. Bowman,
Morris S. Arnold, and Kermit E. Bye

APPENDIX D

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 4:00CR00187-01JMM

United States of America,

Plaintiff,

vs.

Thomas Jay [sic] "T.J." Hively,
Wesley John "Butch" Ketz, Jr.,
Gary Wayne Edwards

Defendants,

vs.

NOTICE OF APPEAL

Pursuant to Federal Rules of Appellate Procedure 3(a), the Defendant, Thomas J. "T.J." Hively hereby gives notice of his intent to appeal the United States Court of Appeals for the Eighth Circuit from an Order entered by the Honorable James M. Moody on May 6, 2002, implicating Defendant Hively's rights against Double Jeopardy as set forth in the Fifth Amendment to the United States Constitution.

Respectfully submitted,

Thomas J. "T.J." Hively, Defendant

By: Samuel A. Perroni
Perroni & James
801 West Third Street
Little Rock, AR 72201
Phone: (501) 372-6555
Fax: (501) 372-6333

CERTIFICATE OF SERVICE

I, Samuel A. Perroni, hereby certify that a true and correct copy of the above and foregoing has been served by U.S. Mail, postage prepaid, to:

Todd Newton, Esq.
U.S. Attorney's Office

425 W. Capitol, 5th Floor
P.O. Box 1229
Little Rock, AR 72203

on this 15th day of May, 2002.

Samuel A. Perroni

APPENDIX E

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 02-2292

UNITED STATES OF AMERICA
Plaintiff/Appellee

vs.

THOMAS JAY "T.J." HIVELY, *et al*
Defendant/Appellant

MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION

The United States of America, by and through counsel, H.E. (Bud) Cummins, United States Attorney for the Eastern District of Arkansas, Todd L. Newton, Assistant U.S. Attorney, and Angela Jegley, Assistant U.S. Attorney, states:

1. On January 24, 2002, this case proceeded to trial before The Honorable James M. Moody, United States District Judge, Eastern District of Arkansas

2. At the conclusion of the government's case, Hively filed multiple motions for acquittal under F.R.Cr.P.29. The district court dismissed some of the counts but deferred its ruling on the remaining motions until after the jury had deliberated.

3. On March 15, 2002, after two and a half days of deliberation, the jury announced that it was unable to reach a verdict, and the district court dismissed the jury without declaring a mistrial. The district court subsequently directed the parties to file

supplemental briefs on the motions for acquittal and stated its intent to rule on the motions after reviewing all of the submissions in light of the evidence presented at trial.

4. On May 3, 2002, the United States notified the district court that it had received information that the court had previously represented Hively in a legal malpractice action from 1992 through 1995. Hively never disclosed this information.

5. On May 6, 2002, Judge Moody recused from the case without entering rulings on Hively's motions for acquittal. The case was subsequently reassigned to The Honorable Stephen M. Reasoner where it is currently pending.

6. Hively appeals Judge Moody's order of recusal, citing Rule 3(a) of the Federal Rules of Appellate Procedure in support of his notice of appeal.

7. Because an order of recusal is not a final order, this Court lacks jurisdiction to hear this appeal.

8. A brief in support of this motion is being submitted contemporaneously with this motion.

WHEREFORE, for all of the reasons stated herein and in its brief in support, the United States respectfully submits that this appeal should be dismissed for lack of jurisdiction.

Respectfully submitted,

H.E. (BUD) CUMMINS
United States Attorney
/S/ TODD L. NEWTON

Assistant U.S., Attorney
ANGELA JEGLEY
Assistant U.S. Attorney
P.O. Box 1229
Little Rock, AR 72203
(501) 324-5342

CERTIFICATE OF SERVICE

A copy of the foregoing has been mailed to Mr. Samuel A. Perroni, Attorney for the defendant, 801 W. Third St., Little Rock, AR 72201, on this 22nd day of May, 2002.

/S/ Todd L Newton

TODD L. NEWTON

APPENDIX F

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 02-2292

UNITED STATES OF AMERICA
Plaintiff/Appellee

vs.

THOMAS JAY "T.J." HIVELY, *et al*
Defendant/Appellant

BRIEF IN SUPPORT OF MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION

I. On September 13, 2000, the grand jury for the Eastern District of Arkansas returned a 64 count Indictment against Thomas James "T.J". Hively, Wesley John "Butch" Ketz, Jr., and Gary Wayne Edwards, charging them with various crimes including RICO, mail fraud, money laundering, and extortion. On January 24, 2002, the case against Hively proceeded to trial, the other defendants having been severed by the district court prior to trial. At the conclusion of the government's case in chief, Hively filed numerous motions for acquittal under Rule 29 of the Federal Rules of Criminal Procedure. The district court dismissed some of the counts but deferred a ruling on the remaining motions until the jury had reached a decision. On March 15, 2002, after two and a half days of deliberation, the jury announced that it was deadlocked, and the district court dismissed the jury without declaring a mistrial. The district court subsequently directed the parties to file supplemental briefs on the Rule 29 motions.

On May 2, 2002, the United States received information that the district court had previously represented Hively in a legal malpractice action that was pending between 1992 and 1995. The

action was filed by James Edwards, Gary Wayne Edward's brother and the former owner of J.E. Bonding, Inc., the bail bond company at the heart of the extortion schemes charged in this case. Hively never disclosed this information. Also on May 2, 2002, the district court's case coordinator contacted undersigned counsel, stating that the district court's rulings on Hively's Rule 29 motions were near completion and that counsel would be contacted on May 6, 2002.

After verifying the information concerning the district court's prior representation of Hively, the United States sent a letter on May 3, 2002, to the district court and to counsel for Hively, informing the court of this discovery and requesting that the court refrain from taking any additional action in this case until the United States could assess the facts and the law and make a determination of the course of action to be taken. On May 6, 2002, the district court entered an order recusing from this case and declining to issue any further rulings. In its order, the court stated that it did not recall representing Hively but that it "would have recused from the case at the outset, not because of any actual bias for or against any party, but rather because there could be a public perception that I would be unable to perform my judicial functions in an impartial manner." The case was then reassigned to The Honorable Stephen M. Reasoner, United States District Judge, Eastern District of Arkansas. On May 9, 2002, Hively filed a Motion to Preserve Previous Rulings, for Order *Nunc Pro Tunc*, and for Protection Against Double Jeopardy, seeking to force Judge Reasoner to enter whatever order Judge Moody had already prepared but not yet entered. That motion is currently pending before Judge Reasoner.

On May 15, 2002, Hively filed a Notice of Appeal, claiming that the recusal order implicates his rights against Double Jeopardy as set forth in the Fifth Amendment to the United States Constitution. In his Notice, Hively cites Rules 3(a) of the Federal Rules of Appellate Procedure in support of his appeal. Rule 3(a) merely provides, "An appeal permitted by law as of right from a district court to a court of appeals may be taken only by filing a notice of appeal with the district clerk within the time allowed by Rule 4."

Hively presumes that he is entitled as a matter of right to an appeal from the district court's order of recusal. Hively is mistaken.

II. Under 28, U.S.C. § 1291, this Court has jurisdiction of appeals from all *final* decisions of the district court. An order of recusal is not a final, appealable order, and Defendant Hively has provided no authority to the contrary, nor can he. In United States v. Brakke, 813 F.2d 912, 913 (8th Cir. 1987), the defendants appealed from orders denying their motions to dismiss a foreclosure action brought by the United States and from a magistrate judge's denying a demand for recusal. Noting its jurisdiction under 28 U.S.C. § 1291, the Court held that none of the motions at issue were immediately reviewable and dismissed the appeal for lack of jurisdiction. Similarly, in Liddell v. Bd. Of Education of City of St. Louis, 677 F.2d 626, 644 (8th Cir.), cert. denied, 459 U.S. 877 (1982), the Court held that it lacked jurisdiction to consider a challenge to the portion of a case in which a district judge recused, citing Hampton v. Chicago, 643 F.2d 478 (7th Cir. 1981) (recusal is not appealable because a litigant has no cognizable interest in having a particular judge sit on his case). See also Scarrella v. Midwest Federal Savings & Loan, 536 F.2d 1207, 1210 (8th Cir), cert. denied, 429 U.S. 885 (1976) (holding that a decision not to recuse was reviewable by appeal only from a final judgment in the matter in which the motion was filed).

In addition, Rule 4(b)(3)(B) of the Federal Rules of Appellate Procedure clearly establishes that Defendant Hively is not entitled to an appeal at this juncture: "A notice of appeal filed after the court announces a decision, sentence, or order - but before it disposes of [a motion for acquittal under Rule 29] - becomes effective upon the later of the following: (i) the entry of the order disposing of the last such remaining motion; or (ii) the entry of the judgment of conviction." As stated previously, Defendant Hively's Rule 29 motions are still pending before Judge Reasoner and no judgment of conviction has been entered. Thus, Hively's notice of appeal is ineffective.

CONCLUSION

WHEREFORE, for all of the reasons stated herein, Hively's appeal is frivolous and should be dismissed for lack of jurisdiction.

Respectfully submitted,

H.E. (BUD) CUMMINS
United States Attorney

/S/ Todd L Newton
TODD L. NEWTON
Assistant U.S. Attorney
ANGELA JEGLEY
Assistant U.S. Attorney
P.O. Box 1229
Little Rock, AR 72203
(501) 324-5342

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been mailed to Mr. Samuel A. Perroni, Attorney for the defendant, 801 W. Third St., Little Rock, AR 72201, on this 22nd day of May, 2002.

/S/ Todd L Newton
TODD L. NEWTON

APPENDIX G

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

NO. 4:00CR00187-01 JMM

UNITED STATES OF AMERICA

Plaintiff

vs.

THOMAS JAY [sic] "T.J." HIVELY,
WESLEY JOHN "BUTCH" KETZ, JR.,
GARY WAYNE EDWARDS

Defendants

DEFENDANT HIVELY'S DESIGNATION OF RECORD ON APPEAL

Defendant Hively designates the following docket items for appeal:

1. Indictment (Docket Entry No. 1)
2. Order filed February 4, 2002, granting Defendant's Motion to Dismiss Racketeering Act 45 of Count 1 (Docket Entry No. 221).
3. The following motions filed by Defendant Hively at the conclusion of the government's case:

   (a) Motion For Judgment Of Acquittal (Counts 2-13 and Racketeering Acts 1-12) (Docket Entry No. 247) *(the Child Support Enforcement mail fraud counts)*,

(b) Motion For Judgment Of Acquittal Or For Disclosure Of Grand Jury Materials (Counts 63-64 and Racketeering Acts 43 a. and 44 a.) (Docket Entry No. 245) *(the extortion counts)*,

(c) Motion For Dismissal Or Judgment Of Acquittal (Counts 14-15 and Racketeering Acts 13-14) (Docket Entry No. 243) *(the Drug Task Force mail fraud counts)*,

(d) Motion For Judgment Of Acquittal On Counts 2-13, 14-15, 16-34, and 35-62 (Docket Entry No. 242),

4. Transcript of proceedings conducted on March 5, 2002, concerning Hively's motions for judgment of acquittal.
5. Order and Judgment of Acquittal concerning Count 13 and Racketeering Act 12 of Count 1 and Counts 35-62 and Racketeering Acts 15-42 of Count 1 (Docket Entry No. 262).
6. Transcript of proceedings conducted on March 8, 2002, concerning Defendant's pending motions for judgment of acquittal.
7. Judgment of Acquittal entered on March 15, 2002, concerning Counts 16-34 and Racketeering Acts 13-14 (Docket Entry No. 265).
8. Note from jury foreman concerning jury being deadlocked and Response from Judge Moody filed March 15, 2002 (Docket Entry No. 266).
9. Transcript of proceedings conducted on March 15, 2002, concerning discharge of jury and renewal of Defendant's pending motions for judgment of acquittal.
10. Defendant's Memorandum Brief in Support of His Motions for Judgment of Acquittal on all Counts

filed on March 20, 2002 (Docket Entry No. 269).

11. Memorandum filed on March 20, 2002, in support of the renewal of Defendant's Motions for Judgment of Acquittal (Docket Entry No. 269).
12. Supplement to Motion filed on May 9, 2002 (Docket Entry No. 277).
13. Second Supplement to Motion filed on May 9, 2002 (Docket Entry No. 279).
14. Order filed May 6, 2002 (Docket Entry No. 273).
15. Judge Moody's unfiled Order which was to be filed on May 6, 2002.
16. Notice of Appeal filed on May 15, 2002 (Docket Entry No. 278).

Respectfully submitted,

THOMAS J. "T.J." HIVELY,
Defendant

By: /s/ SAMUEL A. PERRONI

SAMUEL A. PERRONI
Perroni & James
801 West Third Street
Little Rock, AR 72201
Phone: (501) 372-6555
Fax: (501) 372-6333

CERTIFICATE OF SERVICE

I, Samuel A. Perroni, hereby certify that a true and correct copy of the above and foregoing has been served by U.S. Mail, postage prepaid, to:

Todd Newton, Esq.
U.S. Attorney's Office
425 W. Capitol, 5th Floor
P. O. Box 1229
Little Rock, AR 72203

Carolyn Fant
Court Reporter
U.S. District Court
381 U.S. Post Office & Courthouse
600 W. Capitol Ave.
Little Rock, AR 72201-3325

Doris Collins
Appeal Coordinator
U.S. District Court
381 U.S. Post Office & Courthouse
600 W. Capitol Ave.
Little Rock, AR 72201-3325

on this 23rd day of May, 2002.

SAMUEL A. PERRONI

APPENDIX H

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 02-2292

UNITED STATES OF AMERICA
PLAINTIFF-APPELLEE

VS.

THOMAS JAY "T.J." HIVELY
DEFENDANT - APPELLANT

APPELLANT'S MOTION TO STRIKE, OR IN THE ALTERNATIVE, RESPONSE TO GOVERNMENT'S MOTION TO DISMISS APPEAL

I. INTRODUCTION

For the reasons explained in Section III of this brief, the extraordinary circumstances and issues involved in this appeal may present a case of first impression in this Circuit. Because of the paramount importance of Appellant's double jeopardy interests as affected by the underlying events, Appellant is seeking the intervention of this Court at this time due to the far-reaching implications of the District Court's order of May 6, 2002. Since the decision he appeals can be adequately reviewed in light of the present record, Appellant submits the following arguments in connection with his presentation of a colorable double jeopardy claim which may be asserted on interlocutory appeal.

II. THE GOVERNMENT'S MOTION TO DISMISS THE APPEAL SHOULD BE STRICKEN.

Pursuant to Rule 27(a)(3)(B) of the Federal Rules of Appellate Procedure (FRAP), Appellant Hively first moves to strike the motion to dismiss and brief filed by the government on or about the 22nd day of May, 2002, for the following reasons:

1. The motion fails to comply with FRAP 27 (a)(2)(B)(i) and (ii) in that the assertions of fact are not contained in an affidavit or other paper. The unsupported assertions of fact that are made by the government are biased, argumentative and incomplete.

2. Pursuant to FRAP 27(a)(2)(C)(i), the brief should be stricken as it never should have even been filed.

3. The motion fails to comply with FRAP 27 (a)(2)(B)(iii) in that the pleading does not contain a copy of the District Court's order of May 6, 2002, as an exhibit.

4. The government's pleadings misstate and misinterpret the issue on appeal.

With this in mind, on September 13, 2000, the federal grand jury for the Eastern District of Arkansas returned a 64-count Indictment against Appellant and co-defendants Wesley John "Butch" Ketz, Jr. and Gary Wayne Edwards, charging them with mail fraud, money laundering, extortion, and racketeering. (Docket Entry No. 1). The Indictment also alleged, as racketeering acts, violations of the State of Arkansas' theft of property statute in conjunction with the extortion counts. In particular, the Indictment alleged 12 counts of mail fraud relating to Hively's operation of the Office of Child Support Enforcement; 2 counts of mail fraud relating to the operation of the Sixteenth Judicial District Drug Task Force; 28 counts of mail fraud relating to the Izard County Deputy Prosecuting Attorney's salary; 19 counts of money laundering related to the Drug Task Force; a single count of extortion relating to Kathy

Sampson and Willie Clark; a single count of extortion relating to John Northrop, Sr; an extortion predicate act relating to Troy Gibson and three Arkansas theft of property racketeering acts relating to the Clark, Northrop, and Gibson extortion charges. Finally, all of the substantive charges were combined into one (1) substantive racketeering charge.

On January 24, 2002, Appellant's jury trial began. The co-defendants had been severed by the District Court prior to trial. On February 4, 2002, the District Court granted Appellant's Motion to Dismiss Racketeering Act 45 of Count 1 due to the fact that it failed to contain any allegation of an effect on interstate commerce (Docket Entry No. 221).

On March 1, 2002, the government rested its case. At that time, Appellant filed written motions for judgment of acquittal relating to all of the mail fraud, money laundering, and extortion counts (Docket Entry Nos. 242; 243; 245; 247) and made an oral motion for judgment of acquittal on Count 1. A hearing was held with respect to the motions on March 5, 2002. During that hearing, the District Court expressed reservations concerning the sufficiency of the government's evidence. See Exhibit "A" (Affidavit of Sherry Joyce). The District Court subsequently orally granted Appellant's motions concerning Count 13 and Racketeering Act 12 in Count 1 as well as Counts 35-62 and Racketeering Acts 15-42 in Count 1 for lack of sufficient evidence. The acquittals were reduced to an order which was entered on March 6, 2002 (relating to a single count of the Child Support Enforcement mail fraud charges and all mail fraud counts relating to the Izard County Deputy Prosecuting Attorney's salary) (Docket Entry No. 262). The District Court took the remaining motions for judgment of acquittal under advisement pursuant to Rule 29(b) of the Federal Rules of Criminal Procedure.

The defense presented testimony from March 6 to March 8, 2002. On March 8, 2002, Appellant renewed his pending motions for judgment of acquittal. The District Court again expressed reservations concerning the sufficiency of the government's evi-

dence, particularly with respect to the money laundering counts. Id. The District Court orally advised the parties of its intention to grant a judgment of acquittal based on insufficient evidence with respect to Counts 16-34 and Racketeering Acts 13 and 14 (the Drug Task Force money laundering counts) and subsequently entered an order to that effect on March 15, 2002. (Docket Entry No. 265). The District Court kept the remaining motions under advisement pursuant to Rule 29(b) and indicated his intention to submit the remaining 16 counts to the jury. The District Court again expressed its reservations concerning the sufficiency of evidence relating to the remaining counts and further indicated that if the jury returned a verdict of guilt on the counts that it would entertain a motion to set the verdicts aside. Id.

The jury retired for deliberation on March 12 and on March 15, 2002, the judge received a note from the jury foreman concerning the jury being deadlocked on the remaining charges. (Docket Entry No. 266). The District Court then discharged the jury and Hively once again renewed his pending motions for judgment of acquittal. While a ruling on Appellant's pending motions for judgment of acquittal was reserved by the District Court at that time, the trial effectively concluded after 7 weeks of proceedings. During the course of the trial, the government had introduced almost 900 exhibits, the defense had introduced over 400 exhibits, and Appellant's motions for judgment of acquittal contained over 100 pages of pleadings and exhibits. In any event, the District Court indicated that additional supplemental briefs could be filed by either party simultaneously by March 20, 2002. Both the government and Hively filed additional memorandum briefs for the court's consideration. (Docket Entry Nos. 267 and 269).

The District Court was apparently deliberating its judgment on the motions between March 20, 2002, and the late afternoon of Thursday, May 2, 2002. At that time, the legal assistant for Appellant's counsel received a telephone call from the District Court s courtroom deputy who informed the legal assistant that an order would be ready to be picked up by noon on Friday, May 3, 2002. See Exhibit "A." However, because the lead Assistant United

States Attorney was not going to be in his office all day Friday and would be at his doctor's office until sometime around 10:30 a.m. on Monday, the court would not be releasing the order for pickup until between 10:30 a.m. and noon on Monday, May 6, 2002.

On Friday, May 3, 2002, at 4:30 p.m., the District Court apparently received a letter[1] from the United States Attorney for the Eastern District of Arkansas, Bud Cummins, bringing to the Court's attention that the Court had represented Appellant in a minor legal malpractice action filed in Independence County, Arkansas, in 1992.[2] A copy of the letter is attached as Exhibit "B". The District Court had no recollection of the lawsuit or the fact of his previous representation of Appellant.[3] Nevertheless, by noon on Monday, May 6, 2002, the District Court had entered an order recusing from all three cases (including those involving Hively's co-defendants) and directed that a new judge be assigned by ran-

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[1]A copy of the letter was faxed to Appellant Hively's counsel at approximately 4:46 p.m. on May 3rd.

[2]The letter also contained the assertion that the United States Attorney had only learned of the information on Thursday, May 2, 2002 (the day on which the District Court's courtroom deputy informed the parties that the Court's decision would be ready to be picked up on the following Monday morning).

[3]On two occasions in the pleadings filed by the government, the government makes the assertion that "Hively never disclosed this information." Of course, this assertion makes two substantial assumptions. First, the assertion assumes that Appellant Hively recalled the representation before the U.S. Attorney's letter of May 2, 2002, and second, that Hively had some sort of duty to report this information, if he recalled it, to the District Court. Of course, there is no evidence to support the notion that Hively's recollection was any better than Judge Moody's and Hively has no such duty to disclose such information under the law. See U.S. Const., amend. V.

dom draw.[4] A copy of the Court's order is attached to this pleading as Exhibit "C".

Contrary to the government's representations, Appellant is not appealing the District Court's decision to recuse in this case. The Notice of Appeal (Docket Entry No. 278) plainly states that Hively is appealing from an order entered on May 6, 2002, by the Honorable James M. Moody, the timing of which implicates his rights against double jeopardy as set forth in the Fifth Amendment to the United States Constitution. While the former may arguably be non-appealable in an interlocutory appeal, the latter is certainly immediately appealable if a colorable double jeopardy claim is presented. Accordingly, this Court should strike the government's motion to dismiss the appeal and direct the Clerk to institute a briefing schedule in this case.

III. EVEN IF APPELLANT'S MOTION TO STRIKE IS NOT GRANTED, THE INSTANT APPEAL IS PROPERLY BEFORE THIS COURT SINCE APPELLANT PRESENTS A COLORABLE DOUBLE JEOPARDY CLAIM QUALIFYING FOR INTERLOCUTORY REVIEW.

A. Colorable Double Jeopardy Claims Are Proper Subjects For Interlocutory Appeal.

The gist of the government's argument is that "[u]nder 28 USC § 1291, this Court has jurisdiction of appeals from all *final* decisions of the district court" and that because Appellant is supposedly appealing from the District Court's decision to recuse, Appellant is not entitled to immediate review in this Court. See Government's Brief, at 3 (emphasis in the original). Based upon the erroneous presumption that Appellant's appeal is rooted in his objection to the trial court's decision to recuse, rather than out of concern for double jeopardy protection, the government contends

[4]The case was originally reassigned to Judge Stephen Reasoner who subsequently recused due to illness whereupon the case was reassigned to Judge George Howard, Jr. on May 30, 2002.

that Appellant has no present right to an interlocutory appeal. The government is mistaken.

In the landmark case of Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S. Ct. 1221 (1949), the United States Supreme Court recognized that one "exception" to the final judgment rule is the collateral order doctrine. Id. Holding that a final judgment was to be given a "practical rather than technical construction," the Supreme Court concluded that certain orders collateral to the litigation which might not ordinarily warrant interlocutory review in fact could be immediately appealed so long as they were within "that small class [of orders] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." Id. 337 U.S. at 546, 69 S. Ct. at 1226.

In other words, "[t]o come within the 'small class' of decisions excepted from the final-judgment rule by Cohen, the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable upon appeal from a final judgment." Coopers & Lybrand v. Livesay, 437 U.S. 463, 468, 98 S. Ct. 2454, 2458 (1978). While Appellant recognizes that the Supreme Court has warned against extension of the collateral order doctrine to criminal cases and has characterized the orders in criminal cases which fit within the doctrine as "very few" in number, Appellant submits that the present issue falls squarely within the

doctrine. Carroll v. United States, 354 U.S. 394, 403, 77 S. Ct. 1332, 1338 (1957).[5]

In Abney v. United States, 431 U.S. 651, 97 S.Ct. 2034 (1977), the Supreme Court concluded that a potential double or prior jeopardy violation cannot be effectively remedied if the defendant is required to undergo a second trial and then have the issue considered only upon appeal following conviction in the second trial. According to the Abney Court, the protection is designed to prevent the strain, cost, and personal embarrassment to the defendant from having to undergo a second trial in order to litigate a claim vindicating his double jeopardy interests. Id., 431 U.S. at 661, 97 S.Ct. at 2041. Consequently, when the defendant presents a colorable claim of prior jeopardy, the appropriate remedy is interlocutory appeal and consideration of the claim on the merits without subjecting the defendant to further prosecution. See generally Richardson v. United States, 468 U.S. 317, 104 S.Ct. 3081 (1984).

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[5]In fact, one of the first applications of the collateral order doctrine was in a criminal case, Stack v. Boyle, 342 U.S. 1, 72 S. Ct. 1 (1951). Justice Jackson, in an interlocutory appeal relating to the defendant's desire to seek habeas corpus relief after the trial court denied a motion to reduce bail, explained in a concurring opinion that "[a]n order fixing bail can be reviewed without halting the main trial—its issues are entirely independent of the issues to be tried and unless it can be reviewed before sentence, it can never be reviewed at all." Id., 342 U.S. at 12, 72 S. Ct. at 8 (J. Jackson, concurring). Similarly, in this case the issue of whether the original District Court judge ruled upon Appellant's motions for judgment of acquittal before recusing can be decided entirely independent of the merits of the motions or propriety of the ruling. If the issue is not resolved now, and the successor District Court judge denies Appellant's motions for judgment of acquittal with respect to counts upon which the original District Court judge may have acquitted Appellant (although such ruling may not yet have undergone the ministerial act of being filed with the District Clerk), the effect will be that Appellant will be subject to subsequent prosecution for alleged crimes for which he had already been acquitted.

The Abney court further held that while affording such review to a defendant prior to the subsequent trial might "encourage some defendants to engage in dilatory appeals," such was the cost of insuring preservation of a defendant's double jeopardy rights. Id., 431 U.S. at 662 n. 8, 97 S. Ct. at 2042 n. 8 (holding that district courts also have means to weed out frivolous double jeopardy claims). Moreover, one prominent treatise observes that "[t]he Abney principle has been applied to permit pretrial appeals on a wide variety of double jeopardy claims [.]" WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2d § 3918.5, at 492 (1992).

B. Hively Presents A Colorable Double Jeopardy Claim Qualifying For Interlocutory Review.

The issue on appeal that Appellant intends to present to this Court is that the timing of the District Court's decision to recuse, occurring subsequent to its discharge of the jury and immediately prior to entry of its decision ruling upon Appellant's pending motions for judgment of acquittal, deprived Appellant of a final verdict which could have been plead as a bar to any subsequent prosecution in violation of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. The government is presently attempting to prejudice Appellant's rights by denying him his right to have this adverse impact on his constitutional rights immediately reviewed by this Court.

In the instant case, the facts demonstrate a substantial, "colorable" claim for application of the protections afforded by the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. The trial court recused following receipt of the government's letter merely suggesting a possible basis for disqualification. The letter itself was delivered to the court within 24 hours after the Court had notified counsel for both parties that the order on the pending motions for judgment of acquittal with respect to the remaining counts could be picked up on the following Monday.

With this in mind, a trial court's finding of insufficient evidence is the equivalent of an acquittal for double jeopardy purposes. See Richardson, 408 U.S. at 325, 104 S.Ct. at 3086. Given the original District Court's judgments of acquittal with respect to 48 of the 64 counts, the judge's oft-expressed reservations with respect to the evidence supporting the remaining 16 counts, the Court's announcement that its ruling could be picked up, and the government's last-minute suggestion of an appearance of impropriety, a reasonable observer could justifiably conclude that the trial judge had in fact ruled on the motions and such ruling was at least partially in Appellant's favor. If so, the favorable ruling would obviously result in acquittals on all or some of the remaining counts and provide a constitutional bar to further prosecution with respect to any counts upon which the District Court would have concluded there was insufficient evidence to support a conclusion of guilt.

The protection of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution arises when there has been some event, such as an acquittal, which terminates the original jeopardy. See Richardson, 468 U.S. at 325, 104 S.Ct. at 3086. To the extent that the original District Court judge acquitted Appellant of all or any of the remaining 16 counts, but merely did not engage in the ministerial act of filing the order before recusing and losing jurisdiction of the case, Appellant submits that the timing of the recusal implicates his double jeopardy rights and constitutes a colorable double jeopardy claim qualifying for interlocutory review by this Court.

C. The Government's Cited Authorities Are Inapplicable and Completely Irrelevant To The Issue Of Whether Appellant Has A Colorable Double Jeopardy Claim Sufficient Of Being Reviewed On Interlocutory Appeal.

The government's motion to dismiss and supporting brief assert that the instant appeal should be dismissed upon the sole premise that an order of recusal is not a final order and thus is not a proper subject for interlocutory appeal. Despite the fact that

Appellant clearly articulated a double jeopardy issue in his Notice Of Appeal, the government completely ignores that fact and instead focuses upon the unrelated issue of judicial disqualification.

Since the relevant issue is double jeopardy, not judicial recusal, none of the decisions cited by the government in its brief support the position that Appellant does not have a colorable double jeopardy claim worthy of interlocutory review. In the government's cited case of United States v. Brakke, 813 F.2d 912, 913 (8th Cir. 1987), the appellant brought an interlocutory appeal stemming from a pretrial order denying recusal. Unlike the present case, the interlocutory appeal in Brakke was premised on a pretrial motion and order as opposed to a recusal that occurred 7 weeks after the trial had concluded and the jury had been discharged. The Brakke appeal also arose in the context of a civil rather than criminal case and thus did not involve the significant constitutional and liberty interests that Appellant enjoys but which are in danger of being threatened absent this Court's intervention. Most importantly, unlike the present case, there were no double jeopardy concerns whatsoever at stake in Brakke.

The government also cited Liddell v. Board of Education of the City of St. Louis, 677 F.2d 626 (8th Cir. 1982) and Hampton v. City of Chicago, 643 F.2d 478 (7th Cir. 1981) (a case which Liddell cited). In Liddell, a civil case, the trial court refused to recuse on the basis that there was no evidence of potential impropriety or a conflict justifying disqualification. It was not a criminal case and obviously no double jeopardy concerns were implicated. In Hampton, the trial court recused prior to commencement of the trial on the basis of the court's prior representation of an *amicus curiae* in an early stage of the civil litigation. The case was a civil action and is further distinguishable in that the order of recusal in the present case came at such a late date and on the eve of the trial court's planned entry of its rulings on Appellant's pending motions for judgment of acquittal. Most significantly, no double jeopardy issues were presented nor implicated in Hampton either.

In the government's cited case of Scarrella v. Midwest Federal Savings & Loan, 536 F.2d 1207 (8th Cir. 1976), a civil matter, the trial court had refused to disqualify itself despite a motion requesting recusal. This Court affirmed the trial court's decision in light of the inadequacy of the allegations contained in the movant's affidavit. Similarly, no double jeopardy concerns were implicated in Scarrella.

Again, whether the District Court s decision to recuse was proper in this case is not the issue being appealed—the harm from which Appellant suffers and for which he seeks this Court's immediate intervention relates to the double jeopardy that threatens Appellant if he is not afforded the benefit of any favorable ruling that was made with respect to his then-pending motions for judgment of acquittal (before the recusal occurred). Hively respectfully submits that issue clearly constitutes a colorable double jeopardy claim qualifying for interlocutory review by this Court.

IV. CONCLUSION

As set forth above, though the issue presented for appellate review arises in the context of a judicial recusal order issued 7 weeks following conclusion of the trial and immediately prior to entry of a decision ruling upon Appellant's motions (a decision which very likely would have resulted in further acquittals on certain counts), Appellant has in fact presented a colorable double jeopardy claim upon which interlocutory review is immediately afforded in this Court. Appellant thus moves this Court to deny the government's motion to dismiss and to order the Clerk of this Court to set a briefing schedule in this case.

Respectfully submitted,

THOMAS JAY "T.J." HIVELY,
Appellant

By: /s/ SAMUEL A. PERRONI
SAMUEL A. PERRONI, Ark. Bar #74119
PATRICK R. JAMES, Ark. Bar #82084
MATTHEW R. HOUSE, Ark. Bar #99150
Perroni & James
801 West Third Street
Little Rock, Arkansas 72201
Phone: (501) 372-6555
Fax: (501) 372-6333

CERTIFICATE OF SERVICE

I, Samuel A. Perroni, hereby certify that a true and correct copy of the above and foregoing has been served by U.S. Mail, postage prepaid, to:

Todd Newton, Esq.
U.S. Attorney's Office
425 W. Capitol, 5th Floor
P. O. Box 1229
Little Rock, AR 72203

on this 31st day of May, 2002.

/s/ SAMUEL A. PERRONI

EXHIBIT A

AFFIDAVIT OF SHERRY JOYCE

STATE OF ARKANSAS)
) §§
COUNTY OF PULASKI)

I, Sherry Joyce, hereby state on oath the following:

1. I am a contract certified legal assistant with a speciality in criminal law.

2. I assisted Defendant's counsel, Samuel A. Perroni, with the preparation and trial of the case of United States v. Thomas Jay (sic) Hively, et al, 4:00CR00-187-01. I was present during the entire trial and when the pending motions for judgment of acquittal were made and argued and, if not granted, taken under advisement.

3. The trial lasted seven weeks. The government introduced 896 exhibits; and the defense introduced 417 exhibits.

4. At the conclusion of the government's case and after both sides rested, the district court expressed reservations about the sufficiency of the evidence on the remaining counts. In addition, the district court indicated that he was going to let the remaining counts go to the jury to see what their verdict would be and, if necessary after the jury's verdict, he would rule on the remaining motions of acquittal.

5. During the late afternoon on Thursday, May 2, 2002, I received a telephone call from Judge Moody's Courtroom Deputy who informed me that an Order concerning our client's pending motions for judgment of acquittal could be picked up between 10:30 a.m. and Noon on Monday, May 6, 2002. She told

me that the Order would be ready to be picked up by noon on Friday, May 3, 2002, however, because the Assistant United States Attorney who was lead attorney in the case would not be in his office all day on Friday and would be at the doctor s office until sometime around 10:30 a.m. on Monday, the Court would not be releasing the Order for pick up until between 10:30 a.m. and Noon on Monday, May 6, 2002.

/s/ SHERRY JOYCE

Subscribed and sworn to before me, a notary public, on this 31st day of May, 2002.

/s/ Robin D. Brady
Notary Public

My commission expires:
October 12, 2006

EXHIBIT B

U.S Department of Justice

United States Attorney
Eastern District of Arkansas

Honorable James M. Moody
United States District Judge
600 West Capitol
Little Rock, AR 72201

Re: United States v. Hively, 4:00CR00-187-01 JMM

Dear Judge Moody:

Yesterday, May 3, 2002, we were contacted and advised that the Court represented the defendant Mr. Hively in an action brought in Independence County Circuit Court, No. CIV 92-110, beginning in 1992 and concluding in 1995, the period covered by the Indictment. Mr. Hively was sued in that action by the brother of his original co-defendant in this matter, Gary Edwards, who alleged malpractice by Mr. Hively in matters related to JE Bonding Company, an entity about which the above criminal case is also concerned.

This information, coming to us the eleventh hour of this lawsuit, is troubling and is something which we believe we should be permitted to learn more about in order to determine what action we should take, if any. Ordinarily, such information would be brought to our attention at an earlier time, so that we could proceed in a timely fashion to determine an appropriate and reasoned course. Now, we must consider the ramifications of our response to this information in light of the present status of the case and our desire to not act in undo haste.

Accordingly, we ask the Court to refrain from taking further action in this case until we are able to properly assess the facts

and law in this matter and file an appropriate pleading with the Court. We believe fairness dictates we be given an opportunity to absorb these revelations in light of the provisions of 28 U.S.C. § 455.

Yours very truly,

/s/ Bud Cummins
H.E. (Bud) Cummins
United States Attorney

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

NO. 4:00CR00187- (1-3)

UNITED STATES OF AMERICA

Plaintiff

vs.

THOMAS JAY [sic] "T.J." HIVELY,
WESLEY JOHN "BUTCH" KETZ, JR.,
GARY WAYNE EDWARDS

Defendants

ORDER

Following the dismissal of the jury on March 15, 2002, I have had under consideration motions for judgment of acquittal made by the defendant during the trial. It was my intention to make a final ruling on these motions and file an order with the Clerk today, May 6, 2002. On May 2, 2002, I advised the parties of my intentions with respect to issuing this ruling.

On May 3, 2002, at 4:30 p.m., I received a letter from U.S. Attorney Bud Cummins bringing to my attention the fact that I had represented T.J. Hively in a legal malpractice action filed in Independence County. At the time I received the letter, I had no recollection of the suit or that I had ever represented T.J. Hively.

The U.S. Attorney disclosed that the information about the suit had come from the attorney who filed the complaint against Hively. I asked for the attorney's file and reviewed it over the weekend. From the file, I reached the following conclusions.

For a number of years up to the time of my appointment as a judge in 1995, I was one of the principal attorneys for CNA Insurance Company, which is the legal malpractice insurer for the Arkansas Bar Association. On behalf of CNA, I represented attorneys in numerous cases all over the state. I was employed by the insurance carrier to assume the defense of a legal malpractice case against T.J. Hively. Other than some written discovery requests prepared by a legal assistant, there does not appear there was any activity in the case until the deposition of the plaintiff being deposed was James Edwards, the brother of Gary Edwards, a co-defendant in this criminal case. T.J. Hively attended the deposition. A second deposition of the plaintiff's expert witness was taken by me on April 28, 1995.

The file does not reflect any further activity until an Order of Voluntary Dismissal Without Prejudice was entered by the Circuit Court of Independence County on May 19, 1995, on the motion of the plaintiff. I do not recall the circumstances as to why the case was dismissed by the plaintiff.

When this criminal case was assigned to me on September 13, 2000, and up until May 3, 2002, when I received the letter from the U.S. Attorney, I was totally unaware of the circumstances recited above. If I had known that I had represented Hively in any matter, I would have recused from the case at the outset, not because of any actual bias for or against any party, but rather because there could be a public perception that I would be unable to perform my judicial functions in an impractical manner.

I have no reason to question the validity of any of the rulings that I have made in this case. All of my rulings were made in complete ignorance of any potential conflict. Now that I am made aware of my representation of T.J. Hively, I am recusing from the case to avoid any appearance of partiality and I will not issue any further orders. The case will be reassigned by random draw to another United States District Judge and will proceed as that judge deems appropriate.

Dated this 6th day of May, 2002.

/s/ James M. Moody
United States District Judge

APPENDIX I

APPENDIX I

IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

NO. 02-2292

UNITED STATES OF AMERICA
PLAINTIFF - APPELLEE

vs.

THOMAS JAY "T.J." HIVELY
DEFENDANT - APPELLANT

PETITION FOR REHEARING BY PANEL

TO: Appellee and its Counsel Of Record

PLEASE TAKE NOTICE that the following Petition For Rehearing By Panel is submitted to the Court this date without request for oral argument.

PETITION

Pursuant to the applicable provisions of the Federal Rules of Appellate Procedure ("F.R.A.P.") and Eighth Circuit Rules of Appellate Procedure ("8th Cir. R."), Appellant, Thomas Jay "T.J." Hively ("Appellant"), respectfully petitions the Court to grant a rehearing and reconsideration of its decision issued on July 2, 2002 dismissing his appeal.

ARGUMENT

On May 15, 2002, Appellant filed a Notice Of Appeal relating to an Order entered by the Honorable James M. Moody,

United States District Court for the Eastern District of Arkansas, on May 6, 2002, which implicated Appellant's rights against Double Jeopardy as set forth in the Fifth Amendment to the United States Constitution. Appellant subsequently filed a Designation Of Record On Appeal specifically identifying certain docket items and trial transcripts relevant to his assertion of a colorable Double Jeopardy Claim. On May 22, 2002, Appellee served its Motion To Dismiss Appeal For Lack Of Jurisdiction and a supporting brief. On June 3, 2002, Appellant filed his Motion To Strike, Or In The Alternative, Response To Government's Motion To Dismiss Appeal. On July 2, 2002, a judgment was entered pursuant to 8th Cir. R. 47A granting Appellee's motion to dismiss the present appeal.

After Appellant's receipt of the dismissal order, he learned that the United States District Court clerk in Little Rock, Arkansas who had been assigned to preparing the specific record on appeal (as previously designated by Appellant) had been told not to prepare it in light of Appellee's pending motion. Apparently no record was ever provided or forwarded to this Court as reflected in the Affidavit of Sherry Joyce attached as Exhibit A to this pleading.

With this in mind, 8th Cir. R. 47A(b) provides in pertinent part that:

> [t]he appellee may file a motion to dismiss a docketed appeal on the ground the appeal is not within the court's jurisdiction.... On expiration of the time allowed for filing or express waiver of the right to file a response, or on receipt of the response, *the clerk will distribute to the court the briefs filed, the record on appeal, and the motion and response.* The court will consider the motion and enter an appropriate order.

8th Cir. R. 47A(b) (emphasis added). In light of the facts set forth in Exhibit A, it is clear that if the panel that considered the motion to dismiss did not review the record on appeal before or when considering such motion, the panel would have not had all of the necessary documentation to determine whether Appellant in fact asserted a colorable Double Jeopardy claim qualifying for interlocutory review before this Court. Such a deficiency would also violate the plain language of 8th Cir. R. 47A, the very rule under which the panel's judgment was entered.

CONCLUSION

Appellant respectfully requests that a rehearing be granted and that on rehearing this Court's judgment dated July 2, 2002, be withdrawn and the Court enter a new judgment denying the motion to dismiss appeal.

Dated: July 15, 2002

Respectfully submitted,
THOMAS JAY T.J. HIVELY,
Appellant

By: /s/ SAMUEL A. PERRONI

SAMUEL A. PERRONI, Ark. Bar #74119
Perroni & James, P.A.
801 West Third Street
Little Rock, Arkansas 72201
Phone: (501) 372-6555
Fax: (501) 372-6333

CERTIFICATE OF GOOD FAITH

As counsel for Appellant, I hereby certify that this Petition for Rehearing By Panel is not frivolous and is presented in good faith and not for delay.

Dated: July 15, 2002

THOMAS JAY "T.J." HIVELY,
Appellant

By: /s/ SAMUEL A. PERRONI
SAMUEL A. PERRONI, Ark. Bar #74119
Perroni & James, P.A.
801 West Third Street
Little Rock, Arkansas 72201
Phone: (501) 372-6555
Fax: (501) 372-6333

CERTIFICATE OF SERVICE

I, Samuel A. Perroni, hereby certify that a true and correct copy of the above and foregoing has been served by U.S. Mail, postage prepaid, to:

Todd Newton, Esq.
U.S. Attorney's Office
425 W. Capitol, 5th Floor
P. O. Box 1229
Little Rock, AR 72203

on this 15th day of July, 2002.

/s/ SAMUEL A. PERRONI

EXHIBIT A

AFFIDAVIT

STATE OF ARKANSAS)
)ss.
COUNTY OF PULASKI)

I, Sherry Joyce, hereby state on oath the following:

1. I am a contract certified legal assistant with a speciality in criminal law.

2. I assisted Defendant's counsel, Samuel A. Perroni, with the preparation and trial of the case of United States v. Thomas Jay (sic) Hively, et al.

3. At the request of Mr. Perroni, I called the district court clerk in charge of preparing records for appeals.

4. Upon making the inquiry, I was informed that the clerk had not prepared and sent the designated record to the Eighth Circuit Court of Appeals.

5. Upon further inquiry, I was informed that the record had not been prepared and sent at the suggestion of Judge Howard's law clerk.

/s/ SHERRY JOYCE

Subscribed and sworn to before me, a notary public, on this 15th day of July, 2002.

/s/ Donna Snyder
Notary Public

My commission expires:
May 15, 2007